No. 21-10490

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

R.T.G. FURNITURE CORP.,

Plaintiff-Appellant,

v.

ASPEN SPECIALTY INSURANCE CO., *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida,
Tampa Division
Case No. 8:20-cv-02323-JSM-AEP

UNITED POLICYHOLDERS' *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, amicus curiae hereby certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Pursuant to Eleventh Circuit Rule 26.1-2(b), amicus curiae here certify that, to the best of their knowledge, the CIP contained in Plaintiff-Appellant's brief is complete except for the following:

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STATEMENT OF INTEREST[1]

United Policyholders is a highly respected national non-profit 501(c)(3) organization. Founded in 1991, for nearly 30 years UP has operated as a dedicated advocate and information resource for individual and commercial insurance consumers throughout the entire United States. UP assists purchasers of insurance who are seeking a policy or pursuing a claim for loss reimbursement. UP assists Florida businesses and residents through three programs: Roadmap to Recovery (disaster recovery and claim help), to Preparedness (preparedness through insurance education), and Advocacy and Action (judicial, regulatory and legislative engagements to uphold the reasonable expectations of policyholders). UP hosts a library of informational publications and videos related to personal and commercial insurance products, coverage and the claims process at www.uphelp.org.

UP has been serving Florida residents since 1992 when we helped promote fair claim settlements in the aftermath of Hurricane Andrew. Its activities in the Sunshine State have included long-term disaster recovery assistance; consumer advocacy related to homeowners' insurance rates and availability (i.e. depopulating Citizens); promoting preparedness and mitigation; educating and assisting consumers navigating the complicated insurance claims process under wind, flood,

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), UP states that the undersigned has authored this brief in whole and *pro bono*, no party authored this brief in whole or in part or contributed money to fund this brief.

and liability policies. State insurance regulators, including the Florida Office of Insurance Regulation, academics, and journalists throughout the U.S. routinely engage with UP on issues impacting policyholders. UP's Executive Director, Amy Bach, Esq., has served as an official consumer representative to the National Association of Insurance Commissioners since 2009.

Since March 2020 UP has been engaged in the critical effort to assist business owners around the country whose operations have been impacted by COVID-19 and public safety orders. UP is conducting educational workshops for businesses and trade associations, maintaining an online help library at uphelp.org/COVID. In addition, UP is presenting considerations to courts and regulators on the special rules of contract construction that are uniquely imperative in the context of insurance.

The application of insurance contracts requires special judicial handling. Commerce, government and society benefit when losses are indemnified through insurance purchased by individuals and businesses. The insurance system is woven into the fabric of our economy through mandatory purchase requirements, prudent personal and business risk management and the pricing of goods and services. Each state regulates insurance contracts and transactions through its own set of laws and regulations, yet most insurers operate in multiple states. Most insurers serve three different masters when carrying out their important purpose, and the resulting conflicts that arise often compel judicial balancing, such as the instant case. Insurers

must meet their own revenue objectives *and* the reasonable expectations of policyholders, *and* the demands of their investors and shareholders. Judicial oversight is essential to maintain the purpose and value of insurance purchases by individuals and businesses in this complex system.

Insurance policies are adhesive in nature and their language is increasingly less standardized.[2] That means insurers are using far more creativity in drafting policy terms and conditions and exclusions and limitations than in the past. This has made it much harder for state insurance regulators to review those terms and limitations and determine whether they will effectuate or deprive the purchaser of the protection they intend to purchase. Compounding that challenge to state insurance regulators is that data mining, artificial intelligence and computerized risk modeling have made it literally impossible to give every new policy form the scrutiny it deserves.

Effectuating indemnification in case of loss despite these factors remains a fundamental economic and social objective that courts can advance. United Policyholders ("UP") respectfully seeks to assist this Court in fulfilling these important roles.

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[2] https://www.uphelp.org/library/resource/reevaluating-standardized-insurance-policies, by Professor Daniel Schwarcz, University of Minnesota Law School, Published in University of Chicago Law Review, Vol. 77, 2011, Minnesota Legal Studies Research Paper No. 10-65

In addition to hosting disaster-relief workshops and clinics around the country and helping individual policyholders resolve coverage questions and claim disputes, UP routinely engages in nation-wide policy work to assist and educate the public, governmental agencies, and the courts on policyholders' insurance rights.

Public officials, state insurance regulators, academics, and journalists throughout the U.S. routinely seek UP's input on insurance and legal matters. UP serves on the Federal Advisory Committee on Insurance, which briefs the Federal Insurance Office and in turn, the U.S. Treasury Department. UP's Executive Director has been an official consumer representative to the National Association of Insurance Commissioners since 2009. In that role, UP assists regulators in monitoring policy language and claim practices through presentations and collaboration and the development of model laws and regulations.

UP gave three separate NAIC presentations in 2020 on the topic of coverage and claims for Business Interruption related to COVID-19 and public safety orders.[3]

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[3] NAIC Special Session on COVID-19 Lessons Learned, https://content.naic.org/sites/default/files/national_meeting/speakerbios_covid-19_lessons_learned_summer_nm_2020_0.pdf

Testimony of Amy Bach on Business Interruption Policies and Claims, Summer National Meeting Property and Casualty Insurance (C) Committee August 12th, 2020, https://www.uphelp.org/sites/default/files/attachments/8-12-20_bach_c_committee_final_3.pdf

Testimony of Amy Bach on COVID-19 Related Business Interruption Claims, Coverage Issues, Disputes and Litigation, Summer National Meeting, Consumer Liaison Committee, August 14th, 2020

The gist of UP's presentations was that there is evidence that insurers were not fully candid with regulators about the significance of virus and pandemic-related limitations and exclusions they added to their policies.[4] Although insurers had paid business interruption losses from hotel reservation cancellations due to SARS, when they added limitations and exclusions after that event, some told regulators they had *never* paid virus-related losses and that therefore there would be no rate decrease associated with the policy language change. Because there was no rate decrease and no clear notice that virus and pandemic related losses could be excluded, commercial policyholders were not aware of insurers' efforts to drastically reduce business interruption loss protection until 2020. Because policyholders (including plaintiff in this case) had no notice of a potentially very substantial hole in their insurance, they had no opportunity to cure the gap, hence the need for special judicial handling and careful scrutiny of this case.

Since 1991 UP has filed amicus curiae briefs in federal and state appellate courts across 42 states and in over 500 cases. Amicus briefs filed by UP have been expressly cited in the opinions of state supreme courts as well as the U.S. Supreme Court. *See Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 911 (Cal. 2005); *Cont'l Ins. Co. v. Honeywell*

[4] https://www.propertycasualty360.com/2020/04/07/here-we-go-again-virus-exclusion-for-covid-19-and-insurers/?slreturn=20200927114442

Int'l, Inc., 188 A.3d 297, 322 (N.J. 2018); *Allstate Prop. & Cas. Ins. Co. v. Wolfe*, 105 A.3d 1181, 1185-6 (Pa. 2014).

By submitting a brief in this matter, UP seeks to fulfill the classic role of amicus curiae in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration. This is an appropriate role for amicus curiae. As commentators have often stressed, an amicus is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." R. Stern, E. Greggman & S. Shapiro, *Supreme Court Practice*, 570-71 (1986) (*quoting* Ennis, *Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603, 608 (1984)).

STATEMENT OF THE ISSUES

Whether the district court erred in finding R.T.G. Furniture Corp. ("Rooms To Go") failed to state a claim for business interruption coverage when the district court, reading terms of the policy in isolation, determined "direct physical loss of or damage to" property required Rooms To Go to prove a "tangible injury to property" in its complaint.

SUMMARY OF THE ARGUMENT

The district court erred in holding "direct physical loss of or damage to" has only one meaning—"tangible injury to property"—because in doing so the district court: (1) ignored the plain language and context of the policies; (2) inserted a

judicially created exclusion into the policies (the *Mama Jo's* cleaning exclusion) in contravention of relevant Florida precedent considering this issue; and (3) disregarded the rights of the parties to contract. A finding that "direct physical loss of" property does not require "structural alteration" of property is further consistent with the majority of cases considering this issue, pre-COVID-19.

ARGUMENT

I. The district court erred in failing to give effect to the actual language of the policy.

a. The policies, by their plain language, insure the use of and access to the insured property.

Rooms To Go's losses are covered if, due to the COVID-19 pandemic, Rooms To Go suffered loss of or damage to property, as described in the policies. Although no Florida appellate court has directly addressed claims for coverage arising the COVID-19 pandemic and its consequences, they have on myriad occasions provided binding guidance as to how a court must construe and interpret contracts of insurance.

Federal courts in Florida have either ignored or failed to properly apply these binding principles, based on an erroneous application of *Mama Jo's, Inc. v. Sparta Insurance Co.*, No. 17-CV-23362-KMM, 2018 WL 3412974 (S.D. Fla. June 11, 2018), *aff'd* 823 F. App'x 868 (11th Cir. Aug. 18, 2020); an unpublished case that does not involve a virus, loss of use, or citation to or discussion of the only Florida precedent that deals with a loss of use in the context of a *commercial* property

insurance policy: *Azalea, Ltd. v. American States Insurance Co.*, 656 So. 2d 600 (Fla. 1st DCA 1995).

Nonetheless, judicially created doctrines such as the one contained in *Mama Jo's* (creating an exclusion not found in the policy for perils capable of being cleaned), are of little value where a court applies the actual plain language of an insurance contract to determine coverage. As is Florida law, "[w]hen interpreting a contract, the court must first examine the plain language of the contract for evidence of the parties' intent." *Beach Towning Servs. v. Sunset Land Assocs., LLC*, 278 So. 3d 857, 860 (Fla. 3d DCA 2019) (citation omitted) (emphasis added); *see Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000); *Prudential Prop. & Cas. Ins. Co. v. Swindal*, 622 So. 2d 467, 470 (Fla. 1993).

The policies at issue are here are "all-risk" policies.[5] Such policies create a special type of coverage—"[u]nless the policy expressly excludes the loss from coverage, this type of policy provides coverage for all fortuitous loss or damage

[5] Florida recognizes that in order for a policyholder to recover under an all-risk policy the insured must show (1) a fortuitous loss, and (2) proof that the loss in part occurred during the policy period. *Banco Nacional de Nicaragua v. Argonaut Ins. Co.*, 681 F.2d 1337, 1340 (11th Cir. 1982). The "burden of showing a fortuitous loss is 'not a particularly onerous one.'" *Carib Resorts, Inc. v. Watkins Underwriters at Lloyds,* No. 16-25024-CV, 2018 WL 8048755, at *9 (S.D. Fla. Mar. 20, 2018) (internal citations omitted). Once the policyholder meets this minimal burden, the burden then shifts to the insurer to show that an exclusion or exception to coverage applies. *Id.* at *10.

other than that resulting from willful misconduct or fraudulent acts." *Fayad v. Clarendon Nat'l Ins. Co*., 899 So. 2d 1082, 1085 (Fla. 2005); *see also LaMadrid v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 567 F. App'x 695, 700 (11th Cir. 2014) (internal citation omitted). The different coverages[6] insured under an all-risk policy recognize that property rights are multi-faceted, and include not only the right to maintain property, but also the right to use, access, and enjoy one's property. *See City of Orlando v. MSD-Mattie, LLC*, 895 So. 2d 1127, 1130 (Fla. 5th DCA 2005).[7]

And, here, by their plain language, the policies not only protect the right to own property that has not been tangibly altered, but also explicitly cover the right to use, access, and enjoy property. For example, under the business interruption provision, the Policies provide coverage for:

> [T]he loss resulting from **necessary interruption of business** conducted by the Insured including all interdependent loss of earning between or among companies owned or operated by the Insured caused by **loss**, [or] damage, **or** destruction[8] by any of the perils covered herein

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[6] Florida courts construe coverage grants broadly to provide the greatest extent of coverage possible, while limitations or exclusions to coverage are construed narrowly against the insurer. *See, e.g.*, *Westmoreland v. Lumbermens Mut. Cas. Co.*, 704 So. 2d 176, 179 (Fla. 4th DCA 1997); *State Farm Fire & Cas. Co. v. CTC Dev. Corp.*, 720 So. 2d 1072, 1075 (Fla. 1998); *Anderson*, 756 So. 2d at 34.

[7] It is a fundamental tenet of property law, that property ownership is a set of rights akin to a "bundle of sticks"—a collection of individual rights, which, in certain combinations, constitute property. *United States v. Craft*, 535 U.S. 274, 278 (2002) (internal citations omitted).

[8] The policies' extra expense coverage contains this same language: "loss, [or] damage, or destruction." Initial Brief at 7.

> during the term of this policy to real and personal property as covered herein.

Initial Brief at 7 (emphasis added). Logically, an interruption of business can occur from a loss of use or access, not only a mere structural alteration. And the policies, by their plain language, do not require that damage (structural alteration) precipitate the "necessary interruption of business," but rather allow either "loss, [or] damage, or destruction." *Id.* Each is sufficient alone to trigger coverage under the policies' business interruption provision.

The policies also provide coverage extensions for "civil authority" and "ingress/egress." *Id.* at 8. These coverage extensions similarly deal with access to and/or use of property:

> Civil authority coverage—"[I]nsures against loss resulting from damage to or destruction by the perils insured against, to . . . [t]he actual loss sustained during a period not to exceed sixty (60) consecutive days when, as a result of a peril insured against, **access to real or personal property** is prohibited by order of civil or military authority."
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> Ingress/egress coverage—"[I]nsures against loss resulting from damage to or destruction by the perils insured against, to . . . [t]he actual loss sustained during a period not to exceed sixty (60) consecutive days when, as a result of peril insured against, **ingress to or egress from real or personal property** is thereby **prevented or hindered irrespective of whether the property of the Insured shall have been damaged**.

Id. (emphasis added). Again, by their own terms the policies do not only insure against "damage" to the insured property, but also "loss"— the inability to access or use property, and/or the deprivation of property. And the ingress/egress coverage

further specifies that the coverage applies "irrespective of whether the property of the Insured shall have been damaged."

It is therefore, impossible to square the district court's finding that the policies required that the insured property be structurally altered, with the plain language of the policies.

The "use" and "access" rights, consistent with the object of the parties entering into the insurance contracts, are the key insured property rights businesses have grappled with during the pandemic, in addition to "damage" caused by the actual or imminent presence of the virus.

b. The plain meaning of "direct physical loss of or damage to" does not support the district court's holding.

The critical phrase upon which the district court relied—"direct physical loss of or damage to property"—is both undefined and suggests alternative bases for coverage: physical loss *of* or damage *to*. Having failed to supply their own definition, the insurers are asking courts to rewrite their commercial policies to add words not already present (tangible, structural, etc.), and adopt a narrow interpretation of the phrase in order to avoid coverage altogether. When terms or phrases are undefined, however, "the insurer cannot take the position that there should be a 'narrow, restrictive interpretation of the coverage provided.'" *State Farm Fire & Cas. Co. v. CTC Dev. Corp.*, 720 So. 2d 1072, 1076 (Fla. 1998) (internal citations omitted). Rather, the undefined terms "must be given their plain

and ordinary meaning, which may be supplied from legal and non-legal dictionary definitions. *See, e.g.*, *Gov't Employees Ins. Co. v. Macedo*, 228 So. 3d 1111, 1113 (Fla. 2017).

Merriam-Webster defines "direct" as "characterized by close, logical, causal, or consequential relationship."[9] "Physical" is defined as "having material existence: perceptible especially through the senses and subject to the laws of nature."[10] "Loss" is "the act of losing possession and deprivation."[11] Deprivation in turn is "the state of being kept from possessing, enjoying, or using something."[12] "Damage" is "injury, harm; especially physical injury to a thing, such as impairs its value or usefulness."[13] None of the common definitions of these words require that the loss or damage to property be "structural."

As Rooms To Go explains in its brief, the two key phrases are connected by the disjunctive "or," the occurrence of either "physical loss of" or "damage to"

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[9]Direct, MERRIAM-WEBSTER DICTIONARY, www.merriam-webster.com/dictionary/direct (last visited Mar. 31, 2021).

[10]Physical, MERRIAM-WEBSTER DICTIONARY, www.merriam-webster.com/dictionary/physical (last visited Mar. 31, 2021).

[11]Loss, MERRIAM-WEBSTER DICTIONARY, www.merriam-webster.com/dictionary/loss (last visited Mar. 31, 2021).

[12]Deprivation, MERRIAM-WEBSTER DICTIONARY, www.merriam-webster.com/dictionary/deprivation (last visited Mar. 31, 2021).

[13]Damage, THE OXFORD ENGLISH DICTIONARY, https://www.oed.com/view/Entry/47005?rskey=ySoExm&result=1&isAdvanced=false#eid (last visited Nov. 18, 2020).

property is sufficient to satisfy the insuring clause. *See Beach Towing*, 278 So. 3d at 861 ("[T]he Florida Supreme Court has explained that . . . the word 'or' is a disjunctive participle that marks an alternative.'" (citation omitted) (second alteration in original)); *see also Landrum v. Allstate Ins. Co.*, 811 F. App'x 606, 609 (11th Cir. 2020) (finding the disjunctive "or" in a policy "indicates alternatives and requires those alternatives be treated separately. . . ."). And, because the policies provide that the occurrence of either is sufficient to trigger coverage, the two phrases must mean different things; otherwise the inclusion of both would be superfluous. *See S.-Owners Ins. Co. v. Easdon Rhodes & Assocs. LLC*, 872 F.3d 1161, 1166 (11th Cir. 2017) ("[Courts] must avoid constructions rendering particular phrases mere surplusage.").

The use of "to" after "damage" and "of" after "loss" as preceding "property" ("direct physical loss of or damage to property") is also important. The district court was required to presume that separate use of the prepositions "of" and "to" indicates a distinction between" "loss" and "damage." *See Beach Towing*, 278 So. 3d at 861. And when giving the words "of" and "to" their plain meaning and reading them in context, the "of" clearly and unambiguously refers to use and access, whereas the "to" can clearly and unambiguously refer to the structure or integrity of the property. *See id.* at 861-62; *see also Henderson Rd. Rest. Sys., Inc. v. Zurich Am. Ins. Co.*, No. 20-cv-1239, 2021 WL 168422 (N.D. Ohio Jan. 19, 2021).

In construing an insurance policy, "courts should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect." *Anderson*, 756 So. 2d at 34. "[I]t is well settled that a single contractual term must not be read in isolation." *Beach Towing*, 278 So. 3d at 861 (citation omitted). The district court's narrow interpretation (that "direct physical loss of or damage to property" can only mean structural alteration) is contrary to the plain language of the policies *as a whole*—i.e., the inclusion of coverages that explicitly cover "use" and "access" rights, such as the business interruption, civil authority, and ingress/egress coverages.

c. Florida common law interpreting commercial property policies does not support the district court's holding.

Neither the Supreme Court of Florida, nor any intermediate Florida court has ever held that physical alteration of property is required to trigger coverage under a commercial all-risk policy. *Azalea*, 656 So. 2d 600, is the only Florida appellate court decision to have decided the issue[14] before this Court—what constitutes "direct physical loss of property" under a *commercial* property all-risk policy.

[14] *Maspons* and *Vazquez* involved homeowners policies, which concern very different purposes than commercial property policies. Nonetheless, these authorities also support broader interpretations of the phrase at issue. In *Homeowners Choice Property and Casualty v. Maspons*, 211 So. 3d 1067, 1069 (Fla. 3d DCA 2017) the Third District Court of Appeal held that a home suffered "direct physical loss" even though the structure was not damaged or altered where the failure of a drain pipe to perform its function diminished the value or usefulness of the home. The court also looked to the plain meaning of the undefined terms "loss," "direct," and "physical,"

Azalea is binding precedent, as no Florida court has directly contradicted it. *See Stanfill v. State*, 384 So. 2d 141, 143 (Fla. 1980) ("The decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by [the Supreme Court of Florida]"). As Rooms To Go correctly noted in its initial brief, "*Azalea* stands for the proposition that under Florida law 'direct physical loss' includes more than losses that harm the structure of the covered property." *Three Palms Pointe, Inc. v. State Farm Fire & Cas. Co.*, 250 F. Supp. 2d 1357, 1364 (M.D. Fla. 2003). The district court below (and the district court in *Mama Jo's*) ignored *Azalea* entirely.

The *Azalea* court relied on *Hughes v. Potomac Insurance Co.*, 199 Cal. App. 2d 239 (Cal. Ct. App. 1962) and *Western Fire Insurance Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968), to reach its holding that an invisible, unidentified substance could qualify as physical loss of property. In *Hughes,* the insured property suffered no structural damage at all. A landslide deprived the insured home of the subjacent and lateral support essential to its foundation. Even though the home suffered no structural damage, the court found common sense required a finding of

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determining that when taken together these terms mean the actual diminution in value of something. *Id.*; *see also Vazquez v. Citizens Prop. Ins. Corp.*, 304 So. 3d 1280 (Fla. 3d DCA 2020); *Widdows v. State Farm Fla. Ins. Co.*, 920 So. 2d 149, 150 (Fla. 5th DCA 2006) (finding failure of pipe to function despite no structural damage or alteration to property constituted "physical loss").

coverage because the home was rendered useless. In *First Presbyterian Church*, the court held, in the absence of structural damage, that the insured suffered "direct physical loss" where gasoline infiltrated soil underneath and around a church, depriving the insured of the use of the building because it was *too dangerous for human occupancy*.[15] 437 P.2d at 55.

The district court's reliance on *Mama Jo's, Inc. v. Sparta Insurance Co.*, No. 17-CV-23362-KMM, 2018 WL 3412974 (S.D. Fla. June 11, 2018), is misplaced. *Mama Jo's* is distinguishable because there: (1) the alleged cause of loss was ordinary construction dust; and (2) the insured restaurant continued operating as normal and was not rendered "uninhabitable or unusable." *Id.* at *9 (". . . the restaurant remained open every day, customers were always able to access the restaurant, and there is no evidence that dust had an impact on the operation other than requiring daily cleaning."); *see S. Dental Birmingham LLC v. Cincinnati Ins. Co.*, No. 2:20-cv-681, 2021 WL 1217327, at *5 (N.D. Ala. Mar. 19, 2021) (holding *Mama Jo's* does not foreclose the interpretation of "direct physical loss of" advanced by the policyholder because its "holding was based on the fact that the restaurant

[15] The district court's determination that a virus harms people, not structures misses the point. A commercial property insurance policy's purpose is to insure against risks that make use of property hazardous to people (asbestos, mold, pollution, etc.). Any contrary ruling would insert another judicially created doctrine into commercial property policies: all perils have to be inert to people.

remained open for ordinary operations in spite of dust and debris, suggesting that the dust and debris did not damage the facility because it remained useful for ordinary operations.").

For this reason, the proper holding of *Mama Jo's* is not that all commercial property policies should be read to include an unremunerated cleaning exclusion. Rather, coverage for business interruption losses must be accompanied by an actual loss of use or damage to property necessitating an interruption. To that end, the district court in *Mama Jo's* recognized that a loss of the ability to physically use the property "for future use" may constitute "physical loss" No. 17-CV-23362-KMM, 2018 WL 3412974, at *9 (citing California and Georgia law). The court explained that "direct physical loss" may arise when "occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so." *See id.* (citations omitted). The court went on to acknowledge that "[s]everal courts have held that 'physical loss' occurs when property becomes 'uninhabitable' or substantially unusable.'" *Id.*

Mama Jo's must, therefore, be read consistent with *Azalea's*[16] reasoning that "direct physical loss" may occur absent any "structural" or "visible" alteration to the property.

[16] *Azalea* is binding on this Court as the opinion of a Florida intermediate appellate court. *See Clarke v. U.S.*, 184 So. 3d 1107, 1110 (Fla. 2016) ("[i]n matters of state law, federal courts are bound by the rulings of the state's highest court. If the state's

II. Courts must respect the sanctity of contracts, and avoid inserting their themselves solely on the basis of an improvident bargains.

"Sanctity of contract is fundamental in the laws of this country, so much so that it is protected by the Constitution. A [person]'s contracts may be enforced . . . if they are not against public policy and pertain to matters about which contract are permissible." *Perry Banking Co. v. Swilley*, 17 So. 2d 103, 104 (Fla. 1944). Courts must conform their holdings "with the policy of preserving the sanctity of contract and providing uniformity and certainty in commercial transaction." *Pino v. Spanish Broadcasting System, Inc.*, 564 So. 2d 186, 189 (Fla. 3d DCA 1990). "As stated by [Florida's] Fourth District [Court of Appeal] in *Silvers v. Dis-Com Securities, Inc.*, 403 So. 2d 1133, 1137 (Fla. 4th DCA 1981) . . . '[i]f contracts are to have any viability at all, there must be some means of meaningful enforcement available from the courts. This is increasingly true as society becomes or is perceived by many as having become, more litigious. The bargain struck and perpetually enshrined by a simple handshake is a thing of the past. Society needs assurance that written contracts will not follow in the footsteps of the "gentleman's agreement" and become extinct.'" *Pino*, 564 So. 2d at 189. "[A] court may not deviate from the terms of a voluntary contract either to achieve what it might think is a more appropriate result or 'to relieve the parties from the apparent hardship of an improvident

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highest court has not ruled on the issue, a federal court must look to the intermediate state appellate courts." (citations omitted)).

bargain.'" *McCutcheon v. Tracy*, 928 So. 2d 364, 364 (Fla. 3d DCA 2006); *see Gibney v. Pillifant*, 32 So. 3d 784, 785-86 (Fla. 2d DCA 2010) (quoting *Beach Resort Hotel Corp. v. Wieder*, 79 So. 2d 659, 663 (Fla. 1955)); *Metro Dev. Grp., LLC v. 3D-C&C, Inc.*, 941 So. 2d 11, 14 (Fla. 2d DCA 2006).

"It is never the role of a trial court to rewrite a contract to make it more reasonable for one of the parties or to relieve a party from what turns out to be a bad bargain." *Judy v. Judy*, 291 So. 3d 651, 654 (Fla. 2d DCA 2020) (quoting *Rotta v. Rotta*, 34 So. 3d 107, 108 (Fla. 3d DCA 2010)) (internal citations omitted); *see City of Pompano Beach v. Beatty*, 222 So. 3d 598, 600 (Fla. 4th DCA 2017) ("[W]hen parties choose to agree upon certain terms and conditions of their contract, it is not the province of the court to second-guess their contract, it is not the province of the court to second-guess their wisdom or 'substitute [its] judgment for that of the parties in order to relieve one from an alleged hardship of an improvident bargain.'" (quoting *Int'l Expositions, Inc. v. City of Miami Beach*, 274 So. 2d 29, 30-31 (Fla. 3d DCA 1973))). "Rather, the court's task is to apply the parties' contract as written, not 'rewrite' it under the guise of judicial construction." *Id.* (quoting *Gulliver Sch., Inc. v. Snay*, 137 So. 3d 1045, 1047 (Fla. 3d DCA 2014)).

"A consumer buys insurance for security, protection, and peace of mind." *Ainsworth v. Combined Ins. Co.*, 763 P.2d 673, 676 (Nev. 1988) (citing *Rawlings v. Apodaca*, 726 P.2d 565 (Ariz. 1986)). Yet the insurers here seek only to protect their

own interests. Rooms To Go, like so many other policyholders, dutifully paid its premiums for "all-risk" policies that **do not** contain a virus or communicable disease exclusion, let alone a cleaning exclusion. The insurers could have easily included such language if they had desired to do so, with a proportionate reduction in the premiums charged. *Anderson*, 756 So. 2d at 43 ("If the [insurer] intended to then exclude or limit this liability coverage . . . it was incumbent upon [the insurer] to do so unambiguously.").

The insurers' attempts here to post-loss underwrite and add such new exclusions are reflective of the inequitable nature of insurance contracts, for which Florida's rules of policy interpretation and the laws governing the sanctity of contract are meant to protect against—

> The relationship between an insurance company and its consumer policyholder is perhaps the best example of a relational contract of dependence and inequality. . . .The insurance contract is distinctive because, as a contract that transfers risk, performance may never be required if the risk insured against never comes to pass. . . . Unlike many other contracts, because the performances are sequential, the insured cannot withhold its own performance to give the company an incentive to pay because that performance, the payment of the premium, has already occurred. Also, unlike many other contracts, once the loss has occurred, the insured cannot produce a substitute performance through another contract; a buyer whose seller breaches the duty to deliver contracted goods can measure its performance by the difference between the contract price and the market price or the cover price, but the insured cannot purchase alternative insurance against a risk that has already come to pass.

Jay M. Feinman, *The Insurance Relationship as Relational Contract and the Fairly Debatable Rule for the First-Party Bad Faith*, 46 SAN DIEGO L. REV. 553, 557-559 (2009).

A policyholder purchasing coverage should be able to rely upon the contractual promise to pay, without the uncertainty created by judicially created policy-language after the loss occurs.

III. Room To Go's position is consistent with long standing precedent holding that the inability to use property for its intended purpose constitutes "direct physical loss of " property.

a. A property's unsuitability for an intended purpose constitutes "physical loss or damage" to insured property.

"In determining damage covered by insurance, [a] court must consider the nature and intended use of property, and the purpose of the insurance contract." *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, No. CV-01-1362-ST, 2002 WL 31495830, at *28 (D. Or. June 18, 2002). A business' intended purpose includes providing a safe environment for its customers and the use and enjoyment of the property by its customers without being placed in an unreasonably dangerous situation.

The inability to use property for its intended purpose constitutes a direct physical loss. *See e.g.*, *Matzner v. Seaco Ins. Co.*, No. 96-0498-B, 1998 WL 566658 (Mass. Super. Aug. 26, 1998) (holding the loss of use of apartment building, rendered uninhabitable by carbon monoxide, constituted a direct physical loss); *First*

Presbyterian Church, 437 P.2d 52 (holding the loss of use of church, rendered uninhabitable by gasoline vapors, constituted a direct physical loss); *See also Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W. 2d 147, 152 (Minn. Ct. App. 2001) (holding that a "direct physical loss" occurred when cereal oats were treated by a non-FDA approved pesticide, although chemically identical to an approved pesticide because "function [was] seriously impaired.").

COVID-19 is inherently noxious and its presence, presumed presence, or imminently threatened presence renders property unusable or unsafe for its intended purpose. *See, e.g., Lillard-Roberts*, No. CV-01-1362-ST, 2002 WL 31495830, at *29 ("Although the mere adherence of molecules to porous surfaces, without more, is not physical loss or damage, this case involves more, namely the inability . . . to enjoy the personal property because of the mold spores adhering to it."); *Cooper & Olive Indus. v. Travelers Indem. Co.*, No. C-01-2400, 2002 WL 32775680, at *5 (N.D. Cal. Nov. 4, 2002) (policyholder could claim business income and losses from contamination of well with *E. coli* bacteria); *Pillsbury Co. v. Underwriters at Lloyd's*, 705 F. Supp. 1396, 1401 (D. Minn. 1989) (creamed corn products suffered physical loss or damage where product was under-processed, causing contamination and its eventual destruction).

Moreover, "physical loss or damage" to property can occur even where the loss is temporary, or the reduction in utility is partial. In *Gregory Packaging, Inc. v.*

Travelers Property Casualty Co., No. 2:12-cv-04418, 2014 WL 6675934 (D. N.J. Nov. 25, 2014), the insurance company argued a manufacturing plant that was evacuated following the release of ammonia had not suffered physical loss or damage because the ammonia was remediated over the course of a week. The court rejected this rationale, holding "the property [could] sustain physical loss or damage without experiencing structural alteration," and there was physical loss or damage to the plant from ammonia because "the heightened ammonia levels rendered the facility unfit for occupancy until the ammonia could be dissipated." *Id.* at *16-*17. Similarly, "even where *some utility remains*" in a business operation, a physical condition that renders a property unusable for its intended use constitutes physical loss or damage. *Cook v. Allstate Ins. Co.*, No. 48D02-0611-PL-01156, at *9-*10 (Ind. Super. Nov. 30, 2007).

Courts have also held that there does not have to be actual contamination of property, so long as a physical cause of loss imminently threatens a property's function or habitability. *See, e.g.*, *Port Auth. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (physical loss or damage results "if an actual release of asbestos fibers from asbestos-containing materials has resulted in contamination of the property such that its function is *nearly eliminated or destroyed, or the structure is made useless or uninhabitable, or if there exists an imminent threat of the release of a quantity of asbestos fibers that would cause such loss of utility*" (emphasis added));

Hampton Foods, Inc. v. Aetna Cas. & Sur. Co., 787 F.2d 349, 352 (8th Cir. 1986) (policyholder could claim business income coverage where risk of collapse necessitated abandonment of grocery store).

CONCLUSION

For the reasons set forth herein, the district court's order should be reversed for failing to apply the plain language of the policies and binding Florida law governing the manner and method of policy interpretation, and for failing to respect the sanctity of contracts by imposing judicially created policy-language.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the type-volume limitation because this brief contains 5,819 words.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using in 14-point Times New Roman font.

/s/ R. Hugh Lumpkin

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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